VIRGINIA LAW REGISTER

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Reminiscences V.

Judge Thompson, as we noted in our last, was succeeded by Judge Richard H. Field, of Culpeper, who occupied the bench of the Albemarle Circuit until his death just after the Civil War. Judge Field was an excellent judge and very much liked by the bar. He was a good lawyer—rather disposed to be technical, but giving satisfaction. There are no anecdotes connected with his administration of justice and none of the man himself. He sat on the bench during the dark days of the Civil War, but died before Virginia became Military District No. 1. He was succeeded by Judge Egbert R. Watson, of the Albemarle Bar, who was first appointed by the military authorities and subsequently elected by the first Legislature that assembled after the Civil War. He held his first term on the 9th of September, 1865, and his last October 28th, 1868. Judge Watson was a lawyer of the ablest kind; careful, earnestly desirous to do justice, he worked himself nearly to death in the three years he served as judge. One of his peculiarities was that he insisted on writing his own decrees. The amount of physical labor thus self-imposed was immense and necessitated a great deal of night work during the terms. Those who knew him best said that he was breaking down under the strain, when his successor was elected.

Having a large practice Judge Hugh W. Sheffey held court in Albemarle for him quite often, sitting in cases in which Judge Watson had been counsel. Judge Watson reciprocated by holding court for Judge Sheffey in Augusta, where the latter judge had a large practice. The writer knew Judge Watson very well and had many a contest with him at the bar; for the Judge continued in active practice up to a short time before his death in 1887, some thirteen years after the writer came to the bar. In private life Judge Watson was one of the most amiable, kindest

of men—at the bar he was merciless. Urbane, quiet, calm, yet he never gave nor asked quarter, and woe to the opponent who had a hole in his armor. It was said that the Albemarle Bar contained the best Common Law pleaders in the State—all due to Judge Watson's particularity. One of the older members of the bar told the writer that when Judge Watson came to the bar in 1830 pleading was a farce. By a sort of "gentleman's agreement" declarations were generally a blank piece of paper carefully folded and endorsed, "Smith *v.* Jones, Narro in debt"—"case or assumpsit", as the case might be. If the suit was upon a bond, the bond was folded up in the declaration; if in assumpsit, a copy of the account was filed in the same way. Only in cases of trespass, detinue, etc., was it ever deemed necessary to write out a declaration.

It is said that when the young lawyer Watson demurred to one of these declarations it produced a panic in court which was unprecedented and no amount of coaxing or threatening ever moved him from his course. The consequence was that *Tidd* and *Chitty* were hauled down from the dusty shelves on which they had so long reposed, and studied very hard by old barristers who turned the pages and swore at this young springald who had disturbed them them so outrageously.

Judge Watson was succeeded in 1869 by Judge Henry Shackelford, of whom we have written in a previous number. Judge Shackelford dying, Daniel A. Grimsley, of Culpeper was appointed by Governor McKennie to succeed him. Judge Grimsley occupied the bench until the Readjuster element prevailed, and Judge George P. Hughes, of Goochland was elected and occupied the bench for one term. He had never had anything of a practice; was slow but patient, and surprised the bar, who expected very little of him, by making a very fair judge. The Democratic party having regained power, Judge Grimsley was elected in place of Judge Hughes and held the office until the change in the circuits took Albemarle from his circuit. Judge John M. White was then elected and served until his death in 1912, when the present incumbent, Judge John W. Fishburne, was appointed by Governor Mann and subsequently elected by the Legislature.

Judge Grimsley was a most charming personality—a lovable

man in every way; a good lawyer, somewhat disposed to take things very easily, and as a judge most kindly, considerate and courteous. He was extemely liked and admired by all the practitioners in his circuit. A gallant Confederate soldier, a high-minded Christian gentleman, his death was deeply deplored.

Judge John M. White has left us only too recently for one to attempt to estimate his character fairly. It would be impossible for the writer, who loved the man, to pay proper tribute to his memory, for he fears he might become extravagant in his praise. He had been County Judge for several years before elected Circuit Judge, and therefore had judicial training. His was a peculiarly judicial mind. He looked at a case calmly, weighed its merits and demerits coolly, and always strove to get at the very right of the matter, regardless of technicalities. Naturally of a very high temper, he kept it under splendid control, but those who knew him best used at times to watch with some anxiety his lips quiver and his eyes flash as some wrong came before him and some specious plea was presented to try to convince him that wrong could ever be right. In every relation of life he was steadfast and true, and no man ever deserved more the inscription upon the memorial window to his memory in Christ Church, Charlottesville, Virginia (of which he was a member and vestryman)—"He did justice, loved mercy, and walked humbly with his God."

Police Power—"Overruling Necessity."

In the last two or three decades we have become so used to amazing laws and decisions that a great many of them which would have shocked the fathers beyond all conception are now received with scarcely a notice. It is trustee at in times of war the private citizen must be prepared to sacrifice a good deal of his ideas of constitutional law in order that the safety of the people may be protected, but when a state of warfare has actually ceased it seems unfortunate, to say the least of it, that rules of law and decisions of court should still under some sort of specious guise continue such a course of conduct. Whilst we confess that our sympathy goes very strongly out towards the tenant about to be evicted by a grasping or unprincipled landlord, the question is whether the

danger to the whole nation may not be greater than the suffering to a few individuals, and we cannot but believe that anything which will relieve the congestion of the cities and make people move into the country is an excellent thing. The Police Power has always been the *deus ex machina* which has moved the courts to unprecedented decisions and now the law of "Overruling Necessity" seems to go a step further than the police power ever did. The new rent laws of the State of New York prohibit the eviction of tenants for two years and have lately been sustained by the Appellate Division of the Supreme Court of New York in Brooklyn. Of course this is not a finality and this decision must be passed upon by the Court of Appeals. This decision suspended an order by one of the judges of New York City, denying to a realty company a writ compelling the Clerk of the 6th District Municipal Court to issue a warrant for the dispossession of Joseph Reines, a tenant in a building at 1918 Avenue H., owned by the Realty Company. In suspending this order Mr. Justice Jenks says:

"Whatever the contract rights of the relator or of its tenant, they must give way to the public welfare. A statute enacted in the exercise of the police power—the 'law of overruling necessity,' as it once was termed—is paramount. This statute does not touch the title of the owner. It does not physically take the premises or directly work encroachment upon them. It does interfere to a degree for two years with the owner's absolute control.

"The Legislature is not dealing with an invasion of tramps. Confronted with a stress of circumstances, could not the Legislature have asked what city, even our own New York City, however law-abiding, can maintain its peace, health and order against the consequences of the eviction of perhaps thousands of its law-abiding citizens, so that they may become outcasts with no places to lay their heads? What consequences in this most densely populated city may not follow when the life and health of these citizens and their families face the peril of homelessness?

"New occasions make new duties. In this emergency I cannot see that the statute flouts the Constitution or is collectivism beyond the spirit and law of the land."

The opinion of Justice Jenks was concurred in by Justices Mills, Kelly and Putnam.

Justice Blackmar, in a dissenting opinion, said that during the war we became used to an immense extension of the police power, under the name of war powers, and that this also had in a measure been continued during a period of peace.

"The police power," said Justice Blackmar, "which has no constitutional limitations has no place in a free government. A literal application of much that has been written on the subject of the police power would leave the individual without protection from the arbitrary and tyrannous acts of a temporary majority."

Now it may be that a tremendous hardship would be inflicted upon tenants who are compelled in mid-winter to leave property which they have occupied for some time, and this law might possibly be sustained on the ground that the Government had a right to fix the price of houses just as much as it had to fix the price of sugar, bread, or other commodities; but would the Government have a right to do this except under the exercise of the war power, and is not the action of the State in thus taking the property of the landlord from him for two years against his will a practical confiscation? Suppose a tenant is paying a landlord ten dollars per month and the landlord is offered fifteen, and the term of the lease has about expired and the state prohibits the landlord from evicting the tenant for two years: Is not the landlord not only deprived of his property but the additional rent which he could obtain, confiscated? It is a serious question and, as we have said at first, if anything could be done to get rid of the teeming population of the cities we would take it to be a blessing.

The Volstead Act—Storage of Intoxicating Liquors for Lawful Uses.

In the case of *Street* v. *Lincoln Safe Deposit Company*, etc., the Supreme Court, during the month of November has rendered a very important decision which both in its results and in its reasoning seems juster and more in accordance with human rights than any decision we have seen for some time. Prior to the passage of the National Prohibition

Act, Street was the lessee of a room of a warehouse of the defendant deposit company, in which he had stored wines and liquors lawfully acquired by him, which were in his exclusive possession and control and intended to be used only for personal consumption by the plaintiff and the members of his family or *bona fide* guests. The agent of the Commissioner of Internal Revenue charged with the duty of enforcing the Volstead Act, declared that such storage of liquor by the defendant deposit company was unlawful after the act became effective and he proposed to seize the liquors and notified the plaintiff that he must not remove his liquors from the warehouse. Thereupon Street enjoined the agent of the Commissioner of the Revenue from interfering with his possession in the room in the warehouse and from removing or disposing of his liquors. The lower court dismissed the bill but the Supreme Court of the United States reversed the lower court and held that liquors lawfully acquired before the date of the Prohibition Act or of the Volstead Act, stored solely and in good faith for the purpose of preserving and protecting them until they shall be consumed by the owner and his family or *bona fide* guests was lawful and permissible, and that it was practically almost the same thing as possessing the liquors in a private dwelling, which is permitted under Section 33 of the act. The court held that the plaintiff in the case was in exclusive possession and control of this liquor that the warehouse company had nothing in the world to do with it except in carrying out its public function of furnishing police, fire and other protection to its buildings and contents, and in allowing the plaintiff to have access to his property in order that he may remove it for an admittedly lawful purpose; the storage company had no control whatever over the liquor. The court held also that the storage company could not be said to redeliver the liquor to the plaintiff, because they had nothing to do with the delivery or with the liquor. The plaintiff himself had absolute control over the room, and the storage company had none whatever, except for the purposes mentioned. The court concludes that there is no specific prohibition against the storage of liquors under the circumstances admitted to exist in the case and that the owner had a perfect right to remove

them to his dwelling for consumption by the owner, his family, or his guests. The court concludes with this paragraph: "An intention to confiscate private property, even in intoxicating liquors, will not be raised by inference and construction from provisions of law which have ample field for their operation and in effecting a purpose clearly indicated and declared."

We wonder if the court means by this language to decide that intoxicating liquors can be confiscated where it is clearly indicated in the act. Certainly we have enough authority to hold this true in the decisions of the very court itself. It is a rather strong commentary upon this free country of ours that Great Britain, when it practically confiscated intoxicating spirits, paid for them, but it remained for a free country like ours to evade the clear provisions of the Constitution of the United States and take private property for public use (for only can it be said that the taking of liquor could be justified for the protection of the public use) without compensation. Mr. Justice McReynolds while concurring in the opinion of the court does not assent to the reasoning advanced to support it. He thinks that the lower court properly interpreted the Volstead Act, but holds to enforce it as the judges construed would result in virtual confiscation of lawfully acquired liquors by preventing or actually interfering with their consumption by the owner. He holds that the manufacture, sale and transportation of intoxicating liquors are the things prohibited by the 18th Amendment, but that the personal use of liquor is not prohibited by that act.

Federal Courts—Jurisdiction—Diverse Citizenship.

The case of the *Niles-Bement-Pond Company* v. *Iron Moulders Union,* decided by the Supreme Court of the United States in the month of November presents a rather novel conclusion. The Niles-Bement-Pond works Company was a corporation of New Jersey, It filed its bill in the District Court for the Southern District of Ohio, making the Niles Tool Company, an Ohio corporation, several local labor unions, and many of the striking employees of the Tool company, defendants, it being averred that all the defendants were citizens of Ohio and residents of

the Southern District, and that it being a resident of the State of New Jersey, jurisdiction was in the court on the ground of diverse citizenship. The relief prayed for was an injunction restraining the striking former employees of the Tool company from molesting workmen employed by that company to take their places, upon the ground that petitioner had contracts with the Tool company, the performance of which was being delayed by such interference. No case was cited or relief asked for against the Tool company. It turned out that the Niles-Bement-Pond-Company owned a controlling interest in the capital stock of the Tool company and the same men were president and vice-president respectively of both companies. The president was invested with authority to fix prices for the two companies; three of the five directors of the Tool company were directors of the Niles, etc., Company, and more than ninety-five per cent of the business of that company was obtained through the Niles, etc., Company acting as its general sales agent. The question was whether the Tool company was a necessary party and ought it not actually to have been treated as a plaintiff? The court said that if these questions were both answered in the affirmative, the decree of the Circuit Court of Appeals dismissing the bill must be affirmed—otherwise it must be reversed. It will be noted that the strikers were interfering with the Tool company's men by threats, violence and coercion, and that the Niles-Bement-Pond Company prayed for the injunction. The court held that the Tool company and the Niles-Bement Company were practically the same company; that there was not and could not be any substantial controversy or any collision of interests between the two companies, and that it was perfectly obvious from the potential control which the ownership of stock by the former gave it over the latter company, and from the actual control effected by the membership of the board of directors and by the selective officers of the two companies, that the two companies were practically the same and that the Tool company ought to be treated as the plaintiff instead of the Niles-Bement-Pond Company and being so treated, the court had no jurisdiction. Mr. Justice Pitney and Mr. Justice Reynolds dissenting.

The most remarkable part of this case to us is that any such

suit should ever have been brought by the Niles-Bement-Pond Company. There is no question whatever that it and the Tool company were practically the same person, yet it was the Tool company's employees who were striking and interfering with the Tool company—not with the Niles-Bement-Pond Company, and the mere fact that the Niles-Bement-Pond Company had contracts with the Tool company did not, it seems to us give them an equitable right to enjoin, even though they were practically the owners of the greater part of the stock of the tool company. The Tool company as a corporation was a distinct entity from the Niles-Bement-Pond Company, and would have been, even though all of the stock had been owned by the other company.

Furnishing Medical Attention to Employees—Negligence of Physician—Liability of Master—Physical Pain and Mental Anguish.

The case of the *Virginia Iron, Coal & Coke Company* v. *Odell's Administrator* is of a good deal of importance in two respects: One, in practically affirming the case of the *Bigstone Gap Iron Company* v. *Ketron,* 102 Va. 23; and the other in overruling *Chesapeake, etc., Railroad Company* v. *Rogers,* 100 Va. 324, in respect to an instruction given in that case in regard to mental anguish and physical pain suffered by a decedent. The instant case is one in which an employee of the Virginia Company was at work in its mines in Wise County. While so employed he was taken sick and died. A suit was brought against the Company and against the physician employed by the Company to attend the miners, on the ground that the doctor had negligently failed to render necessary medical attention to the decedent and that such negligence caused or approximately contributed to decedent's death. There was a verdict for the plaintiff and a writ of error awarded. There was no express contract between the parties and the evidence in the case was that the Company were in the habit each month of deducting a small sum which went into the treasury of the Company, and in consideration thereof the employees in case of sickness were entitled to receive medical attention and treatment and all necessary medicine free of additional charge.

The employees had no voice in the selection and choice of the doctor and their money went into the treasury of the company. The Company employed Dr. D. A. Dunkley as one of its physicians, and Odell, a miner, was taken sick on Sunday October 13th and died eleven days thereafter. He sent for the doctor on the 14th day of October and each day during that week. The messenger stated the symptoms of Odell and the doctor sent him medicine and gave directions as to treatment. The messenger reported from time to time that the patient was no better and asked the doctor to see the man, who was very sick, but the doctor did not go, though on another day he again sent medicine. When the doctor was urged to go he gave as a reason for not doing so that on account of the great amount of sickness in the camp he had more work than he could do and the decedent living five miles or more from the doctor's office it would take the greater part of half a day for the doctor to make the trip. He finally did go on October 20th, examined the patient carefully and found that he had double pneumonia, and prescribed for him. He did not pay another visit, although requested so to do, and the patient died on October 24th. The doctor stated he did not go to see him again because he had so many patients in the camp that he could not look after them all, that many of them were just as sick as Mr. Odell and he had done everything for the latter he could do. Dr. Pierce, who was called in by the family of the plaintiff, stated he saw the intestate on the morning of the day he died and that he was dying with yellow jaundice, but there was other evidence in the case that the decedent had the influenza, which was followed by pneumonia, resulting in death. The Company usually employed a physician and an assistant but the assistant volunteered during the war with Germany and left only one doctor. During the early fall in which Odell died influenza was prevalent in the camp of the defendant Company and there were nearly three thousand cases of it, many cases of pneumonia, and forty-seven deaths. The Company did its best to get physicians and finally obtained an elderly doctor who was not able to go out at night or go to any very great distance, and they got a medical student

from the University of Virginia, and one trained nurse. It was insisted by the defendant that the doctor was the agent of the Company and the Company responsible for his negligence. The court, in a very long and carefully considered opinion reaches the following conclusions: That in a case like this to hold the Company liable for the incapacity of the doctor or surgeon it was necessary to aver and prove, 1st, that it was guilty of negligence in selecting an unfit surgeon; 2nd, if reasonable care was exercised in the selection of the surgeon, who afterwards proved incompetent, notice of his incompetency by reason of inherent unfitness or of previous specific acts of negligence from which incompetency might be inferred; or, 3rd, through actual notice to the master of such unfitness or bad habits, or constructive notice by showing that the master should have known the facts had he used ordinary care and oversight and supervision, or by proving the general reputation of the surgeon for incompetency or negligence; and 4th, that the injury complained of resulted from incompetency proved. The mere fact of the incompetency of a servant for the work upon which he was employed is not enough to warrant a jury in finding the master guilty of negligence in employing him. * * * Evidence of only one other negligent act of the servant in fault is not usually sufficient. The rule is also laid down that if the master obtained any profit from the sums paid by the employees he then would be liable for more than ordinary care. Some of the courts have held that the incidental benefit derived by the master from the increased efficiency of service is not such a profit as would render the master liable beyond ordinary care in the selection and retention of the physician, and our court sustains this view but leaves the question open as to where the master makes a pecuniary profit out of the money thus paid in, or where he enters into a regular contract that he will furnish and provide competent medical and surgical attention, then he is liable to the servant for injury resulting from the negligence or malpractice of the physician or surgeon employed by him. An instruction was given in the instant case, telling the jury they might in fixing the amount of the damages take into consideration "such further sum as they shall deem reasonable and just compensation for physical

pain and mental anguish suffered by the decedent," etc. An instruction to this effect was approved by the Supreme Court in *Chesapeake &c. R. R. Company* v. *Rogers,* 100 Va. 324, but the court now says that it is manifest from reading the opinion that the instruction was not carefully considered, and the court quotes Professor Graves in his excellent notes on *Torts,* page 25, in which this instruction is criticized and the reasoning in *Anderson* v. *Hygea Hotel Company,* 92 Va. 687 is declared to express the true rule, that the mental and physical anguish of the deceased is irrelevant in the measure of damages of his beneficiaries, unless as evidence to enable the jury to estimate the mental anguish of the beneficiaries, where the death of the husband or father, for example, occurs not instantaneously but after an interval of suffering and under harrowing circumstances. We have never believed that the instruction in *Chesapeake, etc.* v. *Rogers, supra,* were correct, and we had occasion some years ago in an editorial to comment upon the absurdity of attempting to allow a jury to estimate the mental suffering of a man who subsequently died, as an element in damages. We consider this case a very valuable one in settling the two immediate questions we have referred to.

Note.

We are indebted to Mr. W. Burt Cook, Jr., Assistant Librarian of the Law Library in Brooklyn County Court House for the information that "Considerations on Criminal Law," referred to in the December number (6 V. L. R., pp. 562, 621) was written by Henry Dagge. This authorship is shown by the Harvard Law School Library catalogue.